UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UWAMIE TOMIYASU and KIYO TOMIYASU,	)	
Appellants,	)	
-vs-	)	Civil Appeal No. 20175
RICHARD GOLDEN and AUDREY Y. GOLDEN,	)	
Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA.

APPELLEES' ANSWERING BRIEF

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STATEMENT OF PLEADINGS AND JURISDICTION OF THE COURT

Appellants filed their complaint on July 21, 1964, to void the sale of real property under a deed of trust and to set aside the trustee's deed. (R. 1-13.) Respondents-Appellees' answer, filed August 10, 1964, denied generally the allegations set forth in the complaint, and set up the defense of res judicata. (R. 14-17.) Appellees' motion for

summary judgment was granted and judgment entered thereon on March 5, 1965. (R. 149-150.) Notice of Appeal to the Ninth Circuit Court of Appeals was filed April 6, 1965. (R. 151.)

STATEMENT OF THE CASE

Appellants' claim for relief in the instant proceeding is asserted in paragraph XI of their complaint as follows:

> "That the sale of said lands under the conditions as hereinabove set forth constituted, without notice, violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States." (R. 4.)

To reach this issue, it is necessary to set forth certain facts relating to the prior litigation had between appellants and appellees in the state court and the Supreme Court of the State of Nevada.

Appellants, together with their father, were vested with title to certain real property in Clark County, Nevada. (R. 1-2.) In 1958, they executed a second deed of trust on said property to secure the payment of a promissory note. (R. 58.)

Thereafter, appellants and their father defaulted in the payment of said note. (R. 9.) Under the terms and conditions of the second deed of trust, the trustee was directed to sell at public auction said real property. (R. 9, 59.)

The appellees were the successful bidders at the trustee's sale and upon payment of the bid price, the trustee conveyed the real property to the appellees by trustee's deed dated April 27, 1962. (R. 11-13.)

Appellants and their father filed their first action in the Eighth Judicial District Court, Clark County, Nevada, to set aside the trustee's sale and to cancel and annul the trustee's deed. (R. 21-42.) Following trial, the state district court entered judgment in favor of appellants and their father (R. 52-56), and appellees appealed from that judgment to the Supreme Court of the State of Nevada.

The Supreme Court reversed that judgment, denying relief to appellants. (R. 78.) The opinion of the Nevada Supreme Court is reported in Golden v. Tomiyasu, 79 Nev. 503, 387 P. 2d 989. (Appendix A.)

The appellants and their father then commenced a second action against the appellees and six additional defendants in the Eighth Judicial District Court, Clark County, Nevada, asserting as their claim for relief that the trustee's sale be declared null and void and that the trustee's deed be set aside and declared null and void, together with general and punitive damages. (R. 96-111.)

The appellees, in the second action, moved the state trial court for summary judgment, arguing that the former judgment was a bar to the second action under the doctrine of res judicata. The trial court granted appellee's motion and entered summary judgment in favor of appellees. (R.119-120.)

Appellants and their father appealed from that judgment to the Supreme Court of the State of Nevada. The Supreme Court affirmed. Its opinion is reported in 81 Nev. _____, 400 P. 2d 415 (1965).

On July 27, 1965, appellants and their father filed in the Supreme Court of the United States their petition for a writ of certiorari to the Supreme Court of the State of Nevada, for review of the final judgment in the second action.

On October 11, 1965, the Supreme Court of the United States denied the petition for a writ of certiorari. Tomiyasu v. Golden, U. S. Oct. 11, 1965, No. 401.

On July 21, 1964, appellants filed their complaint in the United States District Court for the District of Nevada, to again set aside the trustee's sale of the real property and to set aside and declare null and void the trustee's deed to appellees. (R. 1-13.)

In this action, the appellants predicated their claim for relief upon the ground that "the sale of the lands ..., without notice, violated the due process clause of the Fourteent Amendment to the Constitution of the United States.". (R. 4, lines 28-31.)

The appellees moved the United States District Court for summary judgment, arguing that the prior state court judgment was a bar to this action under the doctrine of res judicata. (R. 18-122.) On March 5, 1965, the United States District Court for the District of Nevada granted said motion and entered judgment thereon. (R. 149-150.) Appellants have appealed that judgment to this court.

One question is presented:

Does the final judgment of a court of concurrent jurisdiction preclude appellants from relitigating the same issues and what is substantially the same cause of action?

ARGUMENT

Appellants raised the issue of "notice" in their complaint filed June 14, 1962, in the first state court as follows:

> "VII. . . .
>
> "(a) That the notice of breach and election to sell under deed of trust dated the 10th day of November, 1961 was not given to Kiyo and Uwamie Tomiyasu; (R. 26, lines 27-30.)
>
> . . .
>
> "(l) That the notice of sale of said property, particularly that portion thereof describing said property, was not noticed for twenty (20) days successively in three public places of the township where the property was located, and where the property was to be sold.
>
> . . ." (R. 29, lines 23-28.)

This issue was litigated and the Supreme Court of the State of Nevada resolved the issue against appellants, holding that the trustee's sale on foreclosure under the deed of trust was valid and made in accordance with the terms of said deed of trust and the statutes of the State of Nevada. Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989. (Appendix A.)

More particularly, the Supreme Court said at page 992, (Appendix A, page 10):

> "(1) As to the asserted deficiency in the trustee's notice of sale--this was given in strict compliance with the terms of the deed of trust and the statute."

And again, at page 992, (Appendix A, page 11):

> "(6) . . . The trustee gave every notice required by the terms of the trust deed and by the statute."

The appellants now argue, however, through the affidavit of Uwamie Tomiyasu, one of the appellants, that she did not receive notice of the foreclosure proceedings, did not participate in any of the proceedings, that she was not an

actual party litigant in the first state court action, nor did she appear at said trial, either in person or by an attorney. (R. 141-143.)

She does admit, however, that the deed of trust was executed on her behalf by her father, Bill Tomiyasu, as her attorney in fact. (R. 142.)

On September 28, 1946, each appellant executed a general power of attorney appointing their father, Bill Tomiyasu, as their true and lawful attorney. Each power of attorney was duly recorded on October 22, 1946, in the official records of the recorder of Clark County, Nevada, bearing document numbers 236879 and 236880. (Supp. Record.) Both powers of attorney remain in effect and have not been revoked of record. The Clark County, Nevada, Recorder's Certification of this fact was presented to the trial court. (Supp. Record.)

Each of appellants power of attorney is general in terms and unambiguous in construction. Maynard v. Mercer, 10 Nev. 33 (1875).

Nevada Revised Statutes provide that an instrument

relating to or effecting real property may be subscribed by lawful agents.[1]

The argument of appellants that Uwamie Tomiyasu was not a party litigant nor did she appear in the first state action in person or by an attorney is specious. Her attorney of record in this proceeding was and is the same attorney who appeared for and represented appellants since the inception of the state court litigation which commenced June 14, 1962. (R. 21.) By his own affidavit, appellants' attorney states, "That he is attorney of record for the [appellants] herein and that he was attorney of record for the [appellants] in that certain Case No. 117703 in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, between Bill Yonema Tomiyasu, Kiyo Tomiyasu, Uwamie Tomiyasu and Nanyu Tomiyasu, plaintiffs, vs. Richard Golden and Audrey Y. Golden, defendants.". (R. 137.)

1 NRS 111.020. "Every instrument required by any of the provisions of this chapter to be subscribed by any party, may be subscribed by the lawful agent of the party." NRS 111.280 provides for the form of acknowledgment by an attorney in fact.
NRS 111.330 provides that no power of attorney is deemed revoked until an instrument containing such revocation is recorded. Additionally, a negotiable promissory note may be executed by a duly authorized agent. NRS 92.026.

If, in fact, this appellant has any cause to complain for this representation, she should lodge it against her attorney of record. And if her attorney in fact acted improperly, she has her remedy.

Appellees contend that there is no genuine issue as to any material fact and that the granting of their motion for summary judgment under the doctrine of res judicata was proper. The issue of "notice" was litigated and resolved against appellants. Golden v. Tomiyasu, supra.

In Schroeder v. 171.74 Acres of Land, etc., 318 F.2d 311 (8th Cir. 1963), the court stated at 314:

> "Generally stated, under the doctrine of res judicata an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. (citing cases and texts.)
>
> "The doctrine is but a manifestation of the recognition that endless litigation leads to chaos;

that certainty in legal relations must be maintained; that after a party has had his day in court, justice, expediency, and the preservation of the public tranquillity requires that the matter be at an end. (Citing cases.) . . ."

This Court, in the case of Lineker v. Marshall, 7 F.2d 875, 878 (9th Cir. 1925), in affirming the district courts ruling in sustaining the plea of res judicata by reason of a state court judgment held:

". . . Whether these questions were rightfully determined in the state court is not for us to say. We are not a court of appeal authorized to correct the judicial errors charged against the state court in this case. We are only authorized at this juncture to determine whether the rights asserted by the plaintiff, in his complaint, have been judicially determined as between the same parties or their privies by a competent tribunal in another proceeding. If they have, and it so appears in the record, the case is at an end in this court."

See also Rubens v. Ellis, 202 F. 2d 415, 418 (5th Cir. 1953).

In Bankers Trust Co. v. Pacific Employers Insurance Co., 282 F. 2d 106, 111 (9th Cir. 1960), this Court had occasion to consider the Nevada cases involving the plea of res judicata. That decision is cited by the Supreme Court of Nevada when it sustained the ruling of the trial court in the second state court action. Tomiyasu v. Golden, 81 Nev. ____, 400 P.2d 415, 416.

The federal court is bound by state court decisions regarding rights of property and other matters of local law. Dayton & Michigan R. Co. v. Commissioner of Int. Rev., 112 F.2d 627, 630 (4th Cir. 1940). Similarly, in General Trading Co. v. State Tax Comn. of Iowa, 322 U. S. 335, 64 S.Ct. 1028, the United States Supreme Court held that "The application by [the Iowa Supreme Court] of its local laws and the facts on which it founded its judgment are of course controlling here.".

The appellants in their opening brief for the first time raise as an additional issue the validity of a Nevada statute. (Appellants' Opening Brief, 1-3.) The validity of

the statute was not raised by the appellants' pleadings in the United States District Court for the District of Nevada. (R. 1-13, 134-143.) Nor was the validity of the statutes questioned in argument or otherwise made an issue. It has long been the law and axiomatic in this circuit that a litigant cannot present issues or arguments on appeal that were not presented to the trial court. Union Pacific Railroad Company v. Johnson, 249 F.2d 674, 677 (9th Cir. 1957); Carr v. City of Anchorage, 243 F.2d 482 (9th Cir. 1957); United States v. Marshall, 230 F.2d 183 (9th Cir. 1956); In-Man Poulsen Lumber Co. v. Commissioner of Int. Rev., 219 F.2d 159 (9th Cir. 1955); Fanchon & Marco, Inc. v. Paramount Pictures, 215 F.2d 167 (9th Cir. 1954); United States v. Waechter, 195 F.2d 963 (9th Cir. 1952).

There should be an end to this litigation. The Appellants have had their day in court. As the Supreme Court of the United States announced in Baldwin v. Iowa State Traveling Men's Ass'n., 283 U.S. 522, 51 S.Ct. 517 (1931):

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the results of the contest; and

that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the United States District Court for the District of Nevada be affirmed.

Respectfully submitted,

BABCOCK & SUTTON

By:
Howard W. Babcock
Attorneys for Appellees
Suite 105, Friedman Building
300 Fremont Street
Las Vegas, Nevada.

Date: October 18, 1965.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United

States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HOWARD W. BABCOCK,
Attorney for Appellees.

PROOF OF SERVICE

RECEIPT OF three (3) copies of Appellees' Answering Brief are hereby acknowledged this 19th day of October, 1965.

HARRY E. CLAIBORNE, Esq.
108 South Third Street
Las Vegas, Nevada
Attorney for Appellants.

APPENDIX A

IN THE SUPREME COURT OF THE

STATE OF NEVADA

RICHARD GOLDEN and AUDREY Y. GOLDEN, Appellants, v. BILL YONEMA TOMIYASU, KIYO TOMIYASU, UWAMIE TOMIYASU, and NANYU TOMIYASU, Respondents.

No. 4625

led December 23, 1963)

Appeal from judgment of the Eighth Judicial District Court, rk County; George E. Marshall, Judge.

REVERSED.

BABCOCK & SUTTON, of Las Vegas, for Appellants.

HARRY E. CLAIBORNE, of Las Vegas, for Respondents.

OPINION

By the Court, Badt, C.J.:

This was an action to set aside a trustee's sale on fore-sure of a deed of trust. We hold that mere inadequacy of ce, without proof of some element of fraud, unfairness or ression as accounts for and brings about the inadequacy of ce, is not sufficient to support a judgment setting aside sale.

The Tomiyasus had executed a second deed of trust to a

ıstee to secure the payment of $13,564 to the predecessors
l assignors of the First National Bank. This was subject and
ɔordinate to a first deed of trust in the sum of $38,968.29.
default of the second deed of trust the trustee, pursuant to
ıand of the bank as beneficiary, proceeded to sell the proper-
under the powers of the second deed of trust. A public sale
s had, at which the Goldens became the purchasers for the sum
$18,025.73. The Tomiyasus, trustors, commenced this action
the court below to set aside the trustee's sale and to cancel
l annul the deed executed pursuant thereto and tendered into
ırt the amount of the purchase price and offered to pay any
:rued costs. Such tender was made with the filing of the
ıplaint on June 14, 1962, some 50 days after the sale.

The case was tried to the court without a jury. The court
ıdered judgment as prayed, setting aside the sale and annulling
e deed and ordering the clerk of the court to pay to the Goldens
e amount deposited by the Tomiyasus. This appeal followed.

The learned trial judge filed a written decision in which
reviewed each of the reasons advanced by respondents, why the
.e should be set aside. Each of such reasons was rejected by
e court as being sufficient in itself to require the setting
.de of the sale, but stated that the reasons asserted and

iscussed in the opinion "do indicate that because of voluminous
rregularities" the sale must be set aside.

Following the recitals contained in the decision, the court
irected findings to be prepared, and signed the formal findings,
ncluding findings XVI and XVII which had not been mentioned in
he findings contained in the written decision. The added find-
gs are as follows:

"XVI. The court finds that the irregularities and confusion heretofore mentioned would have been, and was misleading, to prospective bidders, and would have discouraged, and did discourage, the attendance of prospective bidders at the sale, which could have, and did, result in the property being sold for an inadequate price to the injury of the trustors.

XVII. The court finds that the trustee, Nevada Title Insurance Company, their agents and employees, in exercise of their power under the trust deed, was an agent of both parties and it was its duty on making the sale to act in good faith and a just and fair discretion in protecting the rights and interests of the trustors with all reasonable effort to make the sale beneficial to such parties by obtaining the full value of the property, or the best price possible,

or a reasonable amount, but intentionally, or unintentionally, failed in its said duty in that regard in the manner hereinabove mentioned in these findings."

Although the evidence is in conflict, there is substantial ort of the court's finding that the land has a market value 2,500 an acre. As five acres had been released from the deed rust, there remained approximately 80 acres valued at a total pproximately $200,000. As against the inadequacy of the bid 18,025.73 as compared with this valuation, the following facts ld be noted:

(1) The deed of trust here involved was subject to a lien prior deed of trust in the sum of $38,968.29.

(2) Said first deed of trust called for monthly payments of .00 each.

(3) The Tomiyasus became delinquent in their payments on first deed of trust to the extent that the First National Bank, ficiary under the second deed of trust, was compelled to ad-e, up to the time of the foreclosure sale, the sum of 09.52. The total under the two deeds of trust amounted to oximately $57,000.

(4) The Tomiyasus were in continual default also in payments

the second deed of trust - the sum secured thereby having
ncreased to $18,024.73 from the original indebtedness of $13,564.

(5) On October 26, 1961, the First National Bank, bene-
iciary under the second deed of trust, notified Nevada Title
surance Company, the trustee, that the trustors were in default,
that the last payment on the principal had been paid in Octo-
r, 1960, and interest had been paid only to March 11, 1961.
cordingly, the trustee was instructed to prepare notice of de-
ult and election to sell in accordance with the provisions of
e deed of trust. Copy of the bank's said letter was mailed to
ll Yonema Tomiyasu. The notice of breach and election to sell
re duly recorded as required by the deed of trust. Publication
notice of trustee's sale was duly made and notice that the
blication was running was mailed to Bill Yonema, said sale
ing noticed for March 13, 1962, at 10 a.m., at the front
trance of the Nevada Title Insurance Company.

(6) From September to November, 1961, Bill Yonema (the father)
s absent in Japan and handed the management of the property over
his son, Nanyu, who continued such management but kept his
ther fully advised. Bill Yonema knew of the delinquency, the
minence of foreclosure, the receipt of the notices from the
ustee, and they made various attempts to refinance the loan

through other sources.

(7) The advertised sale was postponed on seven separate occasions, the final sale date being April 25, 1962. Each of such postponements was for the benefit of the Tomiyasus, who were making constant efforts to raise the necessary funds. Each postponement was proclaimed from the front door of the trustee's office. On none of these occasions did any other buyers appear. If on some of these occasions the trustee waited an additional ten or fifteen minutes before proclaiming the postponement, this cannot be termed even an irregularity. Its actual effect was to give further opportunity for bidders to appear.

(8) At the sale the agent of the trustee read the notice of the sale but when he came to the description, gave a general description of the four parcels without reading the lengthy description of the legal subdivisions, which description appears in the record as some two and one-half typewritten, legal-sized pages. All parties present knew exactly what land was being sold. He announced that, with the consent of those present, he would use that method. No objection was voiced. After reading the notice he explained that five acres had therefore been released from the deed of trust.

(9) The First National Bank, beneficiary, bid the amount its debt, $18,024.73. The Goldens bid a few cents more and e trustee suggested that their bid should be at least $1 more, they bid $18,025.73. There were no further bids and the prop- ty was knocked down to them for their bid.

(10) They went into the trustee's office and Mrs. Golden ote out a personal check on the First National Bank for the ount bid. The trustee telephoned the bank and asked if it uld honor said check and was advised that it would. The ustee thereupon accepted the same. At the bank this check, ich was made payable to the trustee, was replaced by a cashier's eck to the trustee which then drew its own check in favor of the nk, the beneficiary.

The learned trial judge held that inadequacy of price anding alone would not be sufficient to justify setting aside e trustee's sale. He also stated that the failure of the ustee to sell for cash standing by itself would seem to have ttle merit. He also noted that the sale en masse and not in parate parcels was no irregularity, as it was within the dis- etion of the trustee and that in any event he could have re- ived no bid if he offered the property in separate parcels. noted the claim of irregularity in the fact that the des-

ription did not list the water well, buildings, plants, trees, nd shrubbery, and was therefore inadequate. As to this, the otice of sale used the same description as that contained in he deed of trust and which also included the appurtenances.

Reference has been made to the court's rhetorical questions nd its review of certain circumstances. It thought that the bid f the First National Bank of $18,024.73 should have been accepted. t asks, "Why did Mr. Adams (the vice-president and agent of the rustee) advise Mrs. Golden to increase her bid?" This could ardly be characterized as an increase. Over $18,000 in round igures, it brought the bid to $18,025.73 instead of $18,024.73. Why did they accept a check in the amount of $1.00 more than he mortgage holder had bid?" These matters hardly require rgument or answer, as the court frankly followed with this tatement: "These matters do not readily convince the court hat anything was wrong * * *." This in turn, however, is qualified by doubts in the court's mind as to why the trustee presumed o give the Goldens any advice. The court then ponders the uestion as to a possible right of redemption from the bank, hich was foreclosed by the action of the trustee and the cooperation of the defendants." As to this, the court again emarks: "This item, standing alone, would be of no particular

consequence but, however, as we pass on, other comments will develop." The court then turns to the value of the land as $2,500 per acre and the sundry postponements of sale, and asks the one salient question: "Was the sale calculated to make it possible for (the Goldens) to bid without competition?" This is apparently the sole irregularity that the court did not itself dispose of.

As noted, the court's formal finding No. XVI was that irregularities in the postponements of the sale were "misleading, to prospective bidders, and would have discouraged, and did discourage, the attendance of prospective bidders at the sale, which could have, and did, result in the property being sold for an inadequate price to the injury of the trustors." An intense examination of the entire transcript reveals that there is not a word of testimony to support this finding. During the oral argument counsel for the respondents was asked by members of this court to point to anything in the record indicating that any irregularity in the matter of any of the postponements or the proclamation thereof had any such effect or any effect damaging or prejudicial to the respondents. Counsel's reply was that the inadequacy of the price received was the damage, but was unable to point out any damage or disadvantage or harmful effect by way

of preventing or discouraging the attendance of prospective bidders. As noted heretofore, no bidders, other than the parties now before the court, appeared at the original time set for the sale or at any of the postponements.

We are compelled to dispose of the various grounds on which respondents attempt to support the judgment as follows:

(1) As to the asserted deficiency in the trustee's notice of sale--this was given in strict compliance with the terms of the deed of trust and the statute.

(2) As to asserted irregularities in the sundry postponements of the sale--even assuming such irregularities--every postponement was made for the benefit of the trustors and there was no evidence that any bidders were deterred from bidding or appearing.

(3) As to the attack on the trustee's sale of the property en masse, this was entirely within the discretion of the trustee, NRS 107.030 (6), (incorporated by reference in the deed of trust), Py v. Pleitner, 70 Cal.App.2d 576, 161 P.2d 393, was pursuant to the terms of the deed of trust and the statute, and was made with the consent of all persons present.

(4) As to the release of the five-acre parcel as noted when

the notice of sale was read, we can see no prejudice to any party involved. The five acres were released to the attorney for the Tomiyasus.

(5) As to the acceptance of the bidder's check in place of the cash sale required, it was immediately determined that the First National Bank, which was also the beneficiary, advised that it would honor such check, and it did so on presentation. No objection was made.

(6) As to the conduct of the trustee, the record is devoid of any evidence supporting the finding that "intentionally, or unintentionally, (it) failed in its said duty * * * to act in good faith as an indifferent person, exercising good faith and just and fair discretion in protecting the rights and interests of the trustors with all reasonable effort to make the sale beneficial to such parties by obtaining the full value of the property, or the best price possible, or a reasonable amount * *." The trustee gave every notice required by the terms of the trust deed and by the statute.

(7) The learned trial judge apparently thought, and respondents urge, that there was something suspicious in the fact that the trustee notified the Goldens of the sale and notified

o other parties. But the Goldens, and no other parties, had sked for this information. In any event, the Goldens' bid nured to the benefit of the trustors.

(8) This leaves as our sole consideration the question whether the inadequacy of the price standing alone justified the setting aside of the sale. Respondents contend that when the nadequacy is so great as to shock the conscience, this is ufficient justification for the judgment. Respondents rely for his conclusion on the statement contained in 59 C.J.S., Mortgages § 601, at 1055-1057; "The inadequacy of the price, in order to furnish a basis for setting aside or voiding the sale, ust be gross, and such as to shock the conscience of the court, or to suggest fraud, misconduct, or the like. The inadequacy, f any, must be determined on the basis of the real value of the and at the time of the sale and its relation to the total debt gainst the property, and the sale will not be set aside where here is a substantial dispute as to the market value of the roperty or as to the fairness of the price paid. On the other and, where the price realized at the sale was so grossly inadequate s to shock the conscience, it may by itself raise a presumption f fraud, trickery, unfairness, or culpable mismanagement, and

therefore, be sufficient grounds for setting the sale aside. In the final analysis, the question whether the price was grossly inadequate necessarily depends on the peculiar facts of the given case." Respondents also quote the following:

"At page 1056, 59 C.J.S., Mortgages §601, it is said:

'In the case of a very great disparity, the Court will be astute to extract from the facts of the case sufficient to justify it in annulling the sale by reason of mistake, surprise, unfair conduct, or the like.'"

The foregoing is just a part of a very lengthy section. Many cases are cited in the footnotes. We have studied a vast number of these cases, as well as the cases cited in A.L.R., Annot., 8 A.L.R. 1001, under the title "Sale under power in mortgage or trust deed as affected by inadequacy of price." The rule as there stated is the one cited by the learned trial judge: "Mere inadequacy of price alone is not sufficient to invalidate the sale of land under a power in a mortgage or deed of trust." In support, many cases are cited where the inadequacy of price was far greater than appears here. In the present case, accepting the court's conclusion that the value of the land was $2,500 an acre or an aggregate in round figures of $200,000 as against

the aggregate debt evidenced by the first and second deeds of trust of approximately $57,000, the property sold at approximately 28.5 percent of its value. The A.L.R. note cited refers to numerous cases in which the property was sold for a far smaller proportion of its value than 28.5 percent, in which cases the court refused to invalidate the sale. The cases cited are too numerous to discuss. It is true, as asserted by respondent, that many cases in approving the rule that mere inadequacy standing by itself is not sufficient to set aside the sale, qualify it by saying, "unless the inadequacy is so gross as to shock the conscience." In a few jurisdictions the rule is expressed that mere inadequacy of price is not sufficient to set aside a sale unless it be so gross as to raise the inference of fraud or imposition, or similar language. However, a study of the cases indicates that the courts in thus parroting the rule had no occasion to insert the shock-the-conscience clause in the particular cases under consideration, and such quotation appeared in virtually every case to be pure dictum, as there were other elements indicating fraud or imposition on the debtor, or such irregularities as would throw doubt on the good faith of the trustee.

The reason for the insertion of such clauses seems clearly

to be that courts of equity are averse to tying their hands against equitable relief whenever it might seem justifiable. It is not strange to find courts of equity thus desiring to protect themselves. They should, however, not feel under such necessity. Each case is precedent only under the facts of that case. Here we find scores of cases refusing to grant relief upon the ground of inadequacy of price alone. It should be unnecessary to qualify such holding by saying that they will not be bound to it when other factors exist.

Indeed the same language was used by this court in Dazet v. Landry, 21 Nev. 291, 298, but it was entirely unnecessary to the decision itself and was pure dictum. The case involved the propriety of a sheriff's sale of mining property to the second highest bidder. The appellant had bid $8,500., but not having the cash, asked for 15 minutes' time to get the money. This was granted and the sheriff requested in the presence and hearing of the plaintiff that all bidders and bystanders remain, as there would be no sale until the plaintiff's return within the time mentioned with the money to make his offer good. The people did remain and the sheriff waited 30 minutes, and as the plaintiff did not return, proceeded to resell the property and sold it to one Lacrouts for $6,100, the highest bid. This court held that no

fraud or collusion was shown to exist between the officer and any bidders, and this court affirmed the sale to Lacrouts. It will readily be seen that there was no occasion to refer to the "shock-the-conscience theory."

The early case of Runkle v. Gaylord, 1 Nev. 123 (Vol. 1-2 Nev. 100) (1865), is discussed in the A.L.R. annoutation 8 A.L.R. 1001,1010, and refers to a private sale. The court's language was quoted as follows:

> To say that mortgagee with power to sell, who has an incumbrance on the estate of less than one-third of its value--an incumbrance which five or six months' rent will discharge--has the right to sell the estate absolutely to the first man he meets who will pay the amount of incumbrance, without any attempt to get a larger price for it, would in our opinion be equivalent to saying fraud and oppression shall be protected and encouraged."

Before using this language the court had reviewed at length facts indicating collusion and fraud. The headnote referred to the purchaser as one "who knows the mortgagee is sacrificing the property, selling it at a small fraction of its value, and that, too, when (the mortgagee) could collect his debt out of the rents in from two to five months without sale, is not an innocent vendee, and will not be protected in his purchase."

In the present case counsel for respondents, in oral argument, stated that he did not claim fraud or conspiracy but only collusion between the trustee and the high bidder. This did not exist.

Respondents insist that there is no divergence in the authorities to the effect that a judicial sale will be set aside for inadequacy of price alone when such inadequacy is so gross as to shock the conscience. Six cases are cited in support of this contention. They are cited in the margin.[1] In each of such cases the inadequacy in price is coupled with fraud, unfairness, concealment, oppression, or other satisfying grounds to warrant the court in its judgment setting aside the sale. Such being the case, the recital of the rule relied on by respondents is dictum.

To discuss the hundreds of cases involving attacks on public sales by trustees under the powers of a deed of trust where inadequacy of price is claimed, with or without the additional elements of fraud, would be neither necessary nor desirable. We adopt

[1] Foge v. Schmidt, 101 Cal.App.2d 681, 226 p.2d 73; Gandy v.Cameron State Bank, 2 S.W.2d 971 (Tex. 1927); Linney v. Normoyle, 145 Va.589, 134 S.E. 554; Jackson v. Fuller, 85 F.2d 816,819; Winbigler v. Sherman, 175 Cal.270, 165 P.943; Bank of America Nat. Trust & Savings v. Reidy, 15 Cal.2d 243, 101 P.2d 77.

the rule laid down in Oller v. Sonoma County Land Title Company, 137 Cal.App.2d 633, 290 P.2d 880. There the suit to set aside the sale contended "that the foreclosure proceedings were improper; that the trustee was guilty of bad faith; and that the trustee was guilty of bad faith; and that the property was sold for a grossly inadequate price." The court held that when the offer "at the time and place fixed in the original notice of sale and without further publication and posting by oral proclamation, postponed the sale to a definite future date, he was acting validly within the express provisions of the deed of trust," and that "'no other notice of postponed sale need be given.' Since the rule in this state is so well established, any discussion of the cases from other jurisdictions cited and relied upon by plaintiffs' counsel would appear unnecessary." The court then referred to the inadequacy of the consideration and said: "However, even assuming that the price was inadequate, that fact standing alone would not justify setting aside the trustee's sale. 'In California, it is a settled rule that inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale legally made; there must be in addition proof of some element of fraud, unfairness, or oppression as

ccounts for and brings about the inadequacy of price.'"
everal earlier California cases are cited. The allegation of
alue was $25,000 and the testimony as to value was conflicting.
he sale price was $5,025. (In approving the rule thus stated,
e necessarily reject the dictum in Dazet v. Landry, supra,
mplying that the rule requiring more than mere inadequacy of
rice will not be applied "if the inadequacy be so great as to
hock the conscience.")

One of the cases relied on in Oller v. Sonoma County Land
itle Company, supra, is Odell v. Cox, 151 Cal.70, 90 P. 194,
n which the Supreme Court of California, after citing many cases,
aid: "The effect of this rule is that where such inadequacy
tands alone, unaccompanied by any unfairness or other inequi-
able incident, it will not authorize the vacating of the sale.
ut it is universally recognized that inadequacy of price is a
ircumstance of greater or less weight to be considered in
onnection with other circumstances impeaching the fairness of
he transaction as a cause of vacating it, and that where the in-
dequacy is palpable and great, very slight additional evidence
f unfairness or irregularity is sufficient to authorize the
ranting of the relief sought. * * * We think there can be no

doubt under the authorities that where, in addition to gross inadequacy of price, the purchaser has, in the language of the United States Supreme Court, 'been guilty of any unfairness or has taken any undue advantage,' resulting in such gross inadequacy and consequent injury to the owner of the property, he will be deemed guilty of fraud warranting the interposition of a court of equity in favor of the owner who is himself without fault." (Emphasis supplied.)

The California Supreme Court referred to Graffam v. Burgess, 117 U.S. 180, 6 S.Ct. 686, 29 L.Ed. 839, supporting the rule of gross inadequacy if, in addition, the purchaser has been guilty of any unfairness or has taken any undue advantage, or if the owner of the property or the party interested in it has been for any reason misled or surprised.

It also referred to Schroeder v. Young, 161 U.S.334, 16 S.Ct. 512, 40 L.Ed. 721, an appeal from the judgment of the Supreme Court of the Territory of Utah affirming the decree of the territorial trial court setting aside a judicial sale. Mr. Justice Brown, delivering the unanimous opinion of the United States Supreme Court, said:

> While mere inadequacy of price has rarely been held

sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, as if several lots have been sold in bulk where they should have been sold separately, or sold in such manner that their full value could not be realized; if bidders have been kept away; if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security; or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price,--the sale may be set aside, and the owner may be permitted to redeem." (Emphasis supplied.)

After reciting numerous acts of oppression and fraud, the opinion goes on as follows:

"There are other circumstances also found by the court below, which, taken in connection with the grossly inadequate price paid, render it still more inequitable that purchasers

standing in the position of the defendants in this case should insist upon the letter of the bargain, and throw something more than a mere doubt upon the fairness of the transaction." (Emphasis supplied.)

Texas observes the same rule. In Klein v. Glass, 53 Tex. 37, court's final conclusion was: "We do not think, under the timony as presented by the record, that there was any such ud, irregularity, or unfairness in the sale as would authorize to set it aside for inadequacy of price." The sale brought 0. The value of the property sold was $2,000.

It will be recalled from our statement of the facts that court below rejected all claims of fraud and collusion except instance of the Goldens' coming into the sale by reason of information given them by the trustee and their bidding one lar more than the bid on behalf of the beneficiary. It is te evident, however, that this created simply a suspicion in court's mind. During the oral argument counsel for respondents avowed any claim that there was fraud or comspiracy. He stated t all he claimed was that there was collusion between the stee and the Goldens. It would seem to us that for the trustee bring another bidder to the sale could result only in benefit

the trustors. With the case of the Goldens it resulted in ising the bid only one dollar. The beneficiary under the deed trust naturally bid only the amount of its debt, particularly the realization that it was only buying the equity subject to e first mortgage. When the Goldens raised the bid, the bene- ciary was not called upon to make a further bid. Nothing in e case warrants a conclusion of collusion to defraud the miyasus. There is no support for the trial court's intimation at there would have been a right of redemption as against the nk but not as against the Goldens.

To sum up, respondents seek to support the judgment by upling inadequacy of price with one or all of the following:) insufficiency of the notice of sale - but this was given rictly in accordance with statute; (2) the several postponements the sale - but these were all for the benefit of respondents; ere were no irregularities, and no prospective bidders were sled. As to the absence of bidders, this court said in Laughlin v M.B. & L. Assn., 57 Nev. 181,60,P.2d 272: "We are t aware of any authority holding that a sale of this kind is id, for the single reason that no persons were present except e trustee and the beneficiary's attorney or agent." (3) the

al: of the property as a whole and not by parcels - but there
is no abuse here of the exercise of the trustee's discretion,
nd no one requested a sale by parcels; (4) the release of the
ive-acre parcel - but the five acres released were to the
ttorney for the respondents; (5) the acceptance of the check
f the high bidder - but this was almost immediately converted
nto a cashier's check; (6) the attack on the conduct of the
rustee in alerting the Goldens to attend the sale and bid, and
ater in the suggestion that the Goldens' raise in the bid by one
ollar instead of by a few cents - but nothing in this suggests
raud, conspiracy, collusion or other fault. To these observa-
ions there should be added the long-existing default; the fact
hat the trustee gave information and knowledge to the trustors
n addition to that required by statute, and particularly putting
hem on notice that foreclosure was imminent; the many continuan-
es of the sale to give the trustors an opportunity to refinance;
he actual assistance given them by the trustee; the entire
bsence of anything tending to support the accusation that other
idders were discouraged. To this must be added the consideration
f the practical fact that the beneficiary was only bidding in the
quity of the trustors. When bidding for the property subject to

ne provisions of the first deed of trust, the beneficiary was to
ll intents and purposes assuming the obligation to meet the
onthly payments of $705 under the first deed of trust, or, in
efault of this, in the realization that the first deed of trust
ould be foreclosed and wipe out the equity purchased by the
eneficiary here involved.

In virtually all foreclosures the trustor or mortgagor
uffers a loss.[2] He has not been able to meet his obligation
nd loses the property. When the sale is by a trustee, as in
ne present case, he loses it without an equity of redemption.
f the sale is properly, lawfully and fairly carried out, he
annot unilaterally create a right of redemption in himself. If
ne sale is made under a mortgage subject to redemption, he
annot unilaterally extend the period of redemption beyond his
tatutory right. These are all situations which a borrower must
ecognize in executing a mortgage or deed of trust. We regret, as
o all courts facing such a situation, that the mortgagor or trus-
or must lose his property, but we cannot arbitrarily afford re-
lef under such circumstances as here exist.

"1. From time immemorial such 'irreparable injury' has been the
ot of mortgagors and trustors who have been unable to meet their
bligations." Bankers Trust Co. v. Bordwell, 79 Nev. ...386 P2d
32.

Reversed and remanded with instructions to enter judgment denying relief to the respondents.

McNamee and Thompson, JJ., concur.